93-884

No. _____

Supreme Court, U.S.
FILED
DEC - 3 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JOAN PECK,

Petitioner,

v.

C. J. TEGTMEYER, M.D.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. MCKOWEN*
JAMES B. LEES, JR.
HUNT, LEES, FARRELL & KESSLER
7 Players Club Drive
Post Office Box 2506
Charleston, WV 25329-2506
(304) 344-9651

*Counsel of Record

J. RANDOLPH PARKER
PARKER, MCELWAIN & JACOBS
Post Office Box 6186
Charlottesville, VA 22906

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

QUESTION PRESENTED

Whether the lower court erred in holding that the admissibility of expert testimony in a diversity case involving medical malpractice was governed by a state statute concerning medical malpractice actions, Va. Code § 8.01 – 581.20, rather than Fed.R.Evid. 702.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statute and Rule Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

Conclusion 12

Appendix

Per Curiam Opinion of the Court of Appeals of the Fourth Circuit ..... App. 1

Order and Memorandum Opinion of the United States District Court for the Western District of Virginia, Charlottesville Division ..... App. 4

Fed.R.Evid. 702 ..... App. 26

Va. Code Ann. § 8.01 - 581.20 ..... App. 27

TABLE OF AUTHORITIES

Page

CASES:

Barton v. American Red Cross, 829 F.Supp. 1290 (M.D. Ala. 1993) 10

Boggs v. Blue Diamond Coal Co., 497 F.Supp. 1105 (E.D.Ky. 1980) 11

Bourne v. Zak, 895 F.2d 1416 (Table, Text in Westlaw) (9th Cir. 1990) 8

Brooks v. American Broadcasting Companies, Inc., 999 F.2d 167 (6th Cir. 1993) 8

Byrd v. Blue Ridge Rural Electric Co-op, 356 U.S. 525 (1958) 11

Crumley v. Memorial Hospital, 509 F.Supp. 531 (E.D. Tenn. 1978), *aff'd*, 647 F.2d 164 (6th Cir. 1981) 10

Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) 9

Denton by Jamison v. United States, 731 F.Supp. 1034 (D. Kan. 1990) 10

Ealy v. Richardson-Merrill, Inc., 897 F.2d 1159 (D.C. Cir.), *cert. denied*, 111 S.Ct. 370 (1990) 8

Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938) 10

Garbincius v. Boston Edison Co., 621 F.2d 1171 (1st Cir. 1980) 9

Garwood v. International Paper Co., 666 F.2d 217 (5th Cir. 1982) 9

Geophysical Systems Corp. v. Seismograph Service Corp., 738 F.Supp. 348 (C.D. Cal. 1990) 9

Guaranty Trust Co. v. York, 328 U.S. 99 (1945) 11

TABLE OF AUTHORITIES – Continued

Page

Hanna v. Plummer, 380 U.S. 460 (1965) 10

Lee v. Adrales, 778 F.Supp. 904 (W.D. Va. 1991) 9

Leonard v. Uniroyal, Inc., 765 F.2d 560 (6th Cir. 1985) 9

Ralph v. Nagy, 749 F.Supp. 169 (M.D. Tenn. 1990) 10

Robbins v. Whelan, 653 F.2d 47 (1st Cir.), *cert. denied*, 454 U.S. 1123 (1981) 9

Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986) 10

Stepney v. Dilby, 128 F.R.D. 77 (D. Md. 1989) 9

Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) 8

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 10

STATUTES AND RULES:

Fed.R.Evid. 601 ..... 8, 9

Fed.R.Evid. 702 ..... 6, 7, 8, 9, 11

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 ..... 1, 2

Ala. Code § 6-5-548 8

Ark.Stat.Ann. § 16-114-207 8

Colo.Rev.Stat. § 13-64-401 8

Conn.Gen.Stat.Ann. § 52-184(c) 8

Fla.Stat.Ann. § 766.102 8

Idaho Code § 6-1013 8

TABLE OF AUTHORITIES – Continued

Page

Iowa Code Ann. § 147.139 8

Kan.Stat.Ann. § 60-3412 8

La.Rev.Stat.Ann. § 37:1284 8

Mich. Comp. Laws Ann. § 600.2169 8

Tenn. Code Ann. § 29-26-115 8

Tex.Rev.Civ.Stat.Ann. § 4590(i) 8

Va. Code Ann. § 8.01 –581.20 ..... 2, 6, 8

MISCELLANEOUS

C. Wright, A. Miller & J. Cooper, *Federal Practice and Procedure* § 4512 (1982) 11

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (Feb. 1962) 11

The petitioner, Joan Peck, respectfully prays that a writ of certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on September 8, 1993.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit is reprinted in the appendix hereto, p. 1, *infra*. The fact that this opinion affirmed the holding of the trial court will be reported in a table appearing at 4 F.3d 985.

The order and memorandum opinion of the United States District Court for the Western District of Virginia, Charlottesville Division (Kizer, D. J.) are reprinted in the appendix hereto, p. 3, *infra*.

JURISDICTION

Invoking diversity jurisdiction under 28 U.S.C. § 1332, the petitioner brought this suit in the Western District of Virginia. On October 7, 1992, the Western District denied the petitioner's motion for summary judgment, and granted respondent's motion for summary judgement. See p. 4, *infra*.

On September 8, 1993, the Fourth Circuit entered a judgment and per curiam opinion affirming the judgment of the lower court. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Va. Code Ann. § 8.01-581.20 and Fed.R.Evid. 702 are reprinted in the appendix.

STATEMENT OF THE CASE

Joan Peck, the plaintiff in this medical malpractice action, suffered serious radiation burns to her upper back during an angiogram conducted at the University of Virginia Medical Center (UVA) on January 13, 1988. Defendant, C. J. Tegtmeyer, M.D., was the attending radiologist during the procedure. Diversity jurisdiction existed in the lower court under 28 U.S.C. § 1332 because Mrs. Peck was a citizen and resident of West Virginia, while defendant Tegtmeyer was a citizen and resident of Virginia.

On January 13, 1988, Joan Peck was admitted to the University of Virginia Medical Center (UVA) for an angiogram. Plaintiff signed a consent to the procedure at 7:30 a.m. and the procedure apparently started shortly thereafter. The procedure was performed by defendants Selby and Bittner, radiology fellows, defendants Carr and Holmes, more junior radiology residents, and defendant Tegtmeyer, the attending interventional radiologist, and lasted until approximately 7:00 p.m. - 8:00 p.m. that day.

The morning following the angiogram radiology procedure, plaintiff complained that her back felt like it had

been out in the sun, and the skin on her back continued to deteriorate after discharge. Subsequent to her angiogram of January 13, 1988, Mrs. Peck's injury was repeatedly diagnosed as a radiation burn by physicians from the University of Virginia Medical Center, personnel from the National Institute of Health, and her local treating physician. The University of Virginia Medical Center confirmed the diagnosis of radiation burn by pathological examination of a biopsy taken from her back. Finally, on May 18, 1992, Mrs. Peck was admitted to St. Francis Hospital in Pittsburgh, Pennsylvania, for surgery for removal of dead tissue on her back resulting from her burns and skin grafting to replace the dead tissue. Color photographs illustrating the severity of Mrs. Peck's radiation burns appear in the record below as Exhibits 12A and 12B to Memorandum in Support of Plaintiff, Joan Peck's Motion for Summary Judgement (and Denial of Defendant's Motion for Summary Judgment).

According to defendant Tegtmeyer, no records were kept of Mrs. Peck's radiation exposure of January 13, 1988, and the medical records provided by the University of Virginia for Mrs. Peck's admission are totally devoid of any documents concerning radiation exposure time, number of films taken, number of minutes or hours the machine was "on" or similar data. Despite the absence of any supporting documentation, however, defendant Tegtmeyer claimed that he had been able to "reconstruct" the amount of Mrs. Peck's radiation exposure, and that it consisted of approximately forty (40) minutes of fluoroscopy and 171 x-ray films. The amount of radiation exposure alleged by defendant Tegtmeyer, however, is not

consistent with the severity of Mrs. Peck's radiation burns.

When Mrs. Peck brought suit against various physicians involved in the taking of her angiogram of January 13, 1988, including Drs. Selby, Holmes, Carr, Bittner and Tegtmeyer, Dr. David S. Marsden, Director of the Radiation Physics Department and Nuclear Medicine Laboratory at the Roosevelt Hospital in New York, New York, was retained by the plaintiff as an expert witness. Dr. Marsden was prepared to testify that the x-ray machine used on the plaintiff is capable of causing a burn of the type she sustained. He would also have testified that in order to suffer a burn of the nature suffered by Mrs. Peck, an exposure of 1,000 Rads in the eight (8) hour treatment period would have had to have occurred, and that exposing a human being to 1,000 Rads or greater with this type of machine during an eight (8) hour period was a deviation from the appropriate standard of diagnostic radiation procedure in the United States. Furthermore, he would have testified that the failure to recognize an equipment malfunction during the eight (8) hour procedure is a deviation from the standard of diagnostic radiation procedure in the United States. Finally, Dr. Marsden would have testified that if the defendant's "reconstructive" figures are accurate regarding the amount of exposure and number of x-ray films taken, the plaintiff could not have suffered the burn as a result of the x-ray machine.

Dr. Marsden's qualifications with respect to the operation of the type of equipment causing the burn in this matter are unmatched in the United States. Although Dr. Marsden is not a physician, he is responsible for training

radiology resident physicians and has served as an Oral Board Examiner for radiology resident physicians seeking certification in Radiology or Physics. As a physicist, Dr. Marsden is currently responsible for writing the written boards for certification of physicians in Nuclear Medicine. He is Chairman of the Medical Physics Department at his hospital which oversees Nuclear Medicine, Diagnostic Physics and Radiation Therapy, and does extensive consulting on patient cases in all three (3) areas.

By order entered on July 15, 1992, Magistrate B. Waugh Crigler found that David S. Marsden was qualified to render an expert opinion on the issues raised by the plaintiff in this action. In his report and recommendation of the same date, the Magistrate urged the District Court to enter an order denying the parties' motions for summary judgment.

On July 17, 1992, District Judge, James H. Michael, entered an order dismissing the claims against defendant Bayne Selby, M.D., William Holmes, M.D., Stephen Carr, M.D., and Lori Bittner, M.D., under the doctrine of sovereign immunity. This order left C. J. Tegtmeyer, M.D., as the only defendant.

On July 24, 1992, Magistrate Crigler entered an order denying defendant Tegtmeyer's motion to reconsider his earlier order denying Tegtmeyer's request to hold that plaintiff's expert was not qualified.

By order and memorandum opinion dated October 7, 1992, District Judge, Jackson L. Kizer, denied plaintiff's motion for summary judgment, granted defendant Tegtmeyer's motion for summary judgment, and held that Dr. Marsden was not qualified to render an expert opinion,

and that the doctrine of *res ipsa loquitur* was not applicable in this action.

REASONS FOR GRANTING THE WRIT

In this diversity action, a validly enacted Federal Rule of Evidence, Fed.R.Evid. 702, stands in direct conflict with a state statute, Va. Code § 8.01-581.20. which, among other things, prescribes certain requirements for the qualification of expert witnesses in medical malpractice cases. The Virginia statute provides, in pertinent part, that:

> [T]he standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted . . . Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia . . . A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a

> related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

The lower court held that Dr. Marsden was not qualified to give expert testimony in this case because he allegedly did not meet the following requirements established by the Virginia statute:

(1) having expert knowledge of the standards of radiology,

(2) knowing what conduct conforms to those standards, and

(3) having had active clinical practice within one year of the date at issue,

(4) in either radiology or a related field of medicine.

Assuming *arguendo* that Dr. Marsden was not qualified under the Virginia statute to give expert testimony in this case, the lower court still erred in disqualifying Dr. Marsden because it should have applied federal, rather than state, law in assessing Dr. Marsden's qualifications. Under the much more liberal standards of Fed.R.Evid. 702, Dr. Marsden clearly would have been qualified to render an expert opinion in this case. The importance of this choice of law question, and the compelling need for uniform procedures in the federal courts, provide ample reason for the Court to grant this petition for certiorari, and review the ruling of the lower court.

Many states have adopted statutes, regulations or judicially fashioned rules which set out necessary qualifications for expert witnesses in various kinds of cases that might be heard by a federal court sitting in diversity.

Including Virginia, at least a dozen states have enacted statutes which address the qualifications of expert witnesses in medical malpractice actions, and those statutes are usually more restrictive than Fed.R.Evid. 702. *See* Ala. Code § 6-5-548; Ark.Stat.Ann. § 16-114-207; Colo.Rev.Stat. § 13-64-401; Conn.Gen.Stat.Ann. § 52-184(c); Fla.Stat.Ann. § 766.102; Idaho Code § 6-1013; Iowa Code Ann. § 147.139; Kan.Stat.Ann. § 60-3412; Mich. Comp. Laws Ann. § 600.2169; Tenn. Code Ann. § 29-26-115; Tex.Rev.Civ.Stat.Ann. § 4590(i); Va. Code Ann. § 8.01-581.20. There are also state statutes concerning expert witness qualifications which have not been adopted as part of a medical malpractice package, *see, e.g.,* La.Rev.Stat.Ann. § 37:1284, and judicially fashioned rules of evidence which address expert witness qualifications.

Federal courts sitting in diversity (or applying state substantive law for other reasons) have taken a number of positions in deciding whether to apply Fed.R.Evid. 702 or corresponding state law concerning expert witness qualifications. Consistent with the general rule that evidentiary questions are governed by federal law, many courts have held or opined that the qualifications of expert witnesses are evaluated by federal, rather than state, standards. *See, e.g., Brooks v. American Broadcasting Companies, Inc.,* 999 F.2d 167,173 (6th Cir. 1993); *Stutzman v. CRST, Inc.,* 997 F.2d 291, 294-95 (7th Cir. 1993); *Ealy v. Richardson-Merrill, Inc.,* 897 F.2d 1159, 1163 (D.C. Cir.) (federal, rather than state, law governed admissibility of expert testimony concerning role of bendectin in causing birth defects), *cert. denied,* 111 S.Ct. 370 (1990); *Bourne v. Zak,* 895 F.2d 1416 (Table, Text in Westlaw) (9th Cir. 1990);

Dawsey v. Olin Corp., 782 F.2d 1254, 1262 (5th Cir. 1986) (Fed.R.Evid. 702 governed admissibility of expert testimony rather than Louisiana statute prohibiting expert testimony by unlicensed physicians) (phosgene exposure case); *Leonard v. Uniroyal, Inc.*, 765 F.2d 560, 566 (6th Cir. 1985) (in a product liability action based on diversity jurisdiction, "the propriety of admitting expert testimony . . . is governed by federal law"); *Garwood v. International Paper Co.*, 666 F.2d 217, 223 (5th Cir. 1982) (admissibility of testimony by human factors expert was governed by Fed.R.Evid. 702, rather than state law); *Robbins v. Whelan*, 653 F.2d 47, 52 (1st Cir.) ("the question of whether an expert witness is necessary or who would qualify as one is, in a diversity case, controlled by Federal Rules of Evidence"), *cert. denied*, 454 U.S. 1123 (1981); *Garbincius v. Boston Edison Co.*, 621 F.2d 1171, 1174 (1st Cir. 1980) ("In a diversity jurisdiction case, the Federal Rules of Evidence with respect to expert witnesses control."); *Geophysical Systems Corp. v. Seismograph Service Corp.*, 738 F.Supp. 348 (C.D. Cal. 1990) (federal law determines who can testify as an expert witness in federal court, thus, state law barring unlicensed experts from practice of geophysics did not preclude them from testifying in federal court as experts in geophysics); *Stepney v. Dilby*, 128 F.R.D. 77, 79 (D. Md. 1989). *See also Lee v. Adrales*, 778 F.Supp. 904 (W.D. Va. 1991), in which the court determined whether an expert was qualified under the Federal Rules of Evidence in a medical malpractice action without discussing the choice of law issue.

In other cases, courts have held that state law controls, because Fed.R.Evid. 601, which provides that state law shall determine the competency of witnesses,

allegedly requires such a result. *See Barton v. American Red Cross,* 829 F.Supp. 1290, 1299 (M.D. Ala. 1993); *Ralph v. Nagy,* 749 F.Supp. 169 (M.D. Tenn. 1990); *Denton by Jamison v. United States,* 731 F.Supp. 1034, 1036 (D. Kan. 1990); *Crumley v. Memorial Hospital,* 509 F.Supp. 531 (E.D. Tenn. 1978), *aff'd,* 647 F.2d 164 (6th Cir. 1981).

In the case at bar, the Fourth Circuit, which has previously held that federal, rather than state, law determines whether an expert witness is qualified to testify, *see Scott v. Sears, Roebuck & Co.,* 789 F.2d 1052 (4th Cir. 1986), affirmed a decision by the trial court holding that a state statute controlled because the state requirements concerning expert qualifications in medical malpractice actions allegedly were closely intertwined with state substantive policies. In reaching this result, the trial court adopted defendant Tegtmeyer's argument that *Erie R.R. Co. v. Thompkins,* 304 U.S. 64 (1938) and its progeny required the application of state, rather than federal, law.

Although this court has not had an occasion to address a case involving a direct conflict between a Federal Rule of Evidence and state law, it has reviewed cases involving alleged conflicts between the Federal Rules of Civil Procedure and state law, and authorized certain rules for resolving such conflicts. First, absent conflicting state procedure, an applicable federal rule plainly controls (clearly not the situation in this case). *Walker v. Armco Steel Corp.,* 446 U.S. 740, 747 (1980); *Hanna v. Plummer,* 380 U.S. 460, 465 (1965). Second, when a federal rule directly conflicts with state practice (the case at bar), the federal rule applies if it is within the scope of the Rules Enabling Act and the Constitution. *Walker, supra,* 446 U.S. at 748-50; *Hanna, supra,* 380 U.S. at 470-72. Third, absent a

federal rule directly on point, conflicting state practice controls if it is so "bound up" with state substantive law "that its application in the federal court is required". *Byrd v. Blue Ridge Rural Electric Co-op*, 356 U.S. 525, 535 (1958). *See also Guaranty Trust Co. v. York*, 328 U.S. 99, 108-09 (1945).

If anything, the Federal Rules of Evidence should be less affected by the Erie doctrine than any of the other procedural rules followed by the federal courts, since the Federal Rules of Evidence were enacted directly by Congress, and are not subject to the Rules of Decision Act or the Rules Enabling Act. C. Wright, A. Miller & J. Cooper, *Federal Practice and Procedure* § 4512 at 190, 192-93 (1982). As the present case demonstrates, however, the federal judiciary needs some guidance from this Court concerning the relationship of the Erie doctrine and the Federal Rules of Evidence. Fed.R.Evid. 702, and the rest of the Federal Rules of Evidence, grew out of a long standing interest in creating a uniform system of evidentiary rules for use in all cases tried in federal courts. *See Boggs v. Blue Diamond Coal Co.*, 497 F.Supp. 1105, 1119 (E.D.Ky. 1980); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (Feb. 1962). That compelling interest in uniformity of procedure would be well served if this Court were to grant this petition for certiorari and review the decision of the Fourth Circuit in this case.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant this petition for certiorari.

Respectfully submitted,

JAMES A. MCKOWEN
HUNT, LEES, FARRELL & KESSLER
7 Players Club Drive
Post Office Box 2506
Charleston, WV 25329-2506
(304) 344-9651

Counsel of Record

JAMES B. LEES, JR.
HUNT, LEES, FARRELL & KESSLER
7 Players Club Drive
Post Office Box 2506
Charleston, WV 25329-2506
(304) 344-9651

J. RANDOLPH PARKER
PARKER, MCELWAIN & JACOBS
Post Office Box 6186
Charlottesville, VA 22906
(804) 973-3331

NO. ___

In The

Supreme Court of the United States

October Term, 1993

JOAN PECK,

Petitioner,

v.

C. J. TEGTMEYER, M.D.,

Respondent.

APPENDIX

TABLE OF CONTENTS

Appendix Page

Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit.....App. 1

Order of the United States District Court for the Western District of Virginia, Charlottesville Division.....App. 4

Memorandum Opinion of the United States District Court for the Western District of Virginia, Charlottesville Division.....App. 5

Fed.R.Evid. 702.....App. 26

Va. Code Ann. § 8.01 - 581.20 .....App. 27

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOAN PECK, *Plaintiff-Appellant,* v. C.J.TEGTMEYER, M.D., *Defendant-Appellee,* *and* *BAYNE SELBY; WILLIAM HOLMES; STEPHEN CARR; LORI BITTNER,* *Defendants.*	No. 92-2412

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
Jackson L. Kiser, District Judge.
(CA-90-24-C)

Argued: July 12, 1993

Decided: September 8, 1993

Before HAMILTON, LUTTIG, and WILLIAMS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: James Anthony McKowen, HUNT, LEES, FARRELL & KESSLER, Charleston, West Virginia, for Appellant. William H. Archambault, PIEDMONT LIABILITY TRUST, Charlottesville, Virginia, for Appellee, **ON BRIEF:** James B. Lees, Jr., HUNT, LEES, FARRELL & KESSLER, Charleston, West Virginia; J. Randolph Parker, PARKER, MCELWAIN & JACOBS, Charlottesville, Virginia, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joan Peck appeals the district court's grant of summary judgment for C.J. Tegtmeyer, M.D., in Peck's claim against him under the Virginia Medical Malpractice Act (Act), Va. Code §§ 8.01-581.1 to - 581.20 (Michie 1992 & Supp. 1993). Peck contends the district court erred in applying the standard for expert witness qualification found in § 8.01-581.20 of the Act instead of applying Fed. R. Evid. 702. Pursuant to the Virginia standard, the district court disqualified Peck's only expert witness on the issue of standard of care. Peck also argues that the district court erred in refusing to apply the doctrine of res ipsa loquitur.

Our review of the record, the district court's opinion, and the arguments of counsel discloses that this appeal is

without merit. Accordingly, we affirm on the basis of the thorough and well-reasoned opinion of the district court. *Peck v. Tegtmeyer,* No. 90-0024-C (W.D. Va. Oct. 7, 1992).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JOAN PECK, Plaintiff, v. C.J. TEGTMEYER, M.D., Defendant.	)	Civil Action No. 90-0024-C **ORDER** (Filed October 7, 1992)

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is ADJUDGED and ORDERED that the Plaintiff Peck's motion for summary judgment is DENIED and the Defendant Tegtmeyer's motion for summary judgment is GRANTED. Accordingly, JUDGMENT is entered if [sic] favor of ~~all Defendants and~~ against the Plaintiff.

The Clerk is directed to dismiss this case from the docket and send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED this 7th day of October, 1992.

/s/ Jackson L. Kiser
United States District Judge

A TRUE COPY, TESTE:

Joyce F. Witt, Clerk

By: /s/ V. Harris
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JOAN PECK,
Plaintiff

v.

C. J. TEGTMEYER, M.D.,
Defendant

Civil Action No. 90-0024-C

MEMORANDUM OPINION

By: Jackson L. Kiser, Judge
United States District Court

(Filed October 7, 1992)

This matter is before the court on defendant's objections to (1) the magistrate judge's order denying defendant's request for a ruling that plaintiff's designated expert is not qualified to testify to the standard of care, and (2) the magistrate judge's report and recommendation recommending that this court deny the parties' motions for summary judgment. For the reasons set forth in this memorandum opinion, this court overrules the magistrate judge's order, accepts the magistrate judge's recommendation of denial of plaintiff's motion for summary judgment, rejects the recommendation of denial of defendant's motion for summary judgment, and grants summary judgment in favor of the defendant.

I.

On January 13, 1988, plaintiff Joan Peck was admitted to the University of Virginia Hospital for a thyroidal arteriogram. The procedure started at about 11:30 a.m.

and was completed about 8:00 p.m. Besides Dr. Tegtmeyer, four other physicians were involved in performing the arteriogram which required the manipulation of catheters through the patient's arteries from the leg and arms to the region of the parathyroid in the neck. A fluoroscope was used to monitor the progress of the catheters through the arteries. Once a catheter was in place, dye was injected and flat x-ray films were taken. Although the procedure took 8 hours, much of the time was used in setting up for a "run." Dr. Tegtmeyer's primary function was to interpret the x-ray films[.] He was in and out of the examination room during the course of the procedure. The other physicians who participated in the procedure had the primary responsibilities of inserting the catheters and getting them into proper position for insertion of the dye and taking the x-ray films. The plaintiff alleges that defendant, Dr. Tegtmeyer,[1] her attending radiologist, negligently performed the procedure, thereby causing a burn on her back due to excessive exposure to radiation. Inexplicably, there are no records of the amount of radiation Peck was exposed to, but the morning following the arteriogram, Peck awoke with a radiation burn on her back, which worsened with the passage of time. Peck has required several skin grafts.

The plaintiff has identified only one expert witness to testify as to the negligence issue, David Marsden. Dr. Marsden is a radiation physicist; he is not a radiologist nor a medical doctor of any sort. Of plaintiff's other six

---

[1] Four other defendant physicians, all hospital residents or fellows, were dismissed from the case on the ground of sovereign immunity by Judge Michael's order of July 17, 1992.

designated witnesses, three are medical doctors, but none is a radiologist and, by their own admissions, none can testify to the applicable standard of care.

The defendant filed a motion for summary judgment on the ground that plaintiff's evidence cannot, as a matter of law, establish a violation of the applicable standard of care. Specifically, the defendant argues that plaintiff's expert is not qualified to testify to the standard of care for a radiologist and that, because the plaintiff does not have a qualified expert, the plaintiff cannot establish either the standard of care or a violation of the standard of care, two essential elements of a medical malpractice claim.

Subsequently the plaintiff filed a motion for summary judgment grounded, in relevant part, on the doctrine of *res ipsa loquitur.*

At a hearing on July 10, 1992, Magistrate Judge Crigler heard argument on the cross motions for summary judgment. The magistrate judge addressed defendant's motion first. As a threshold matter, the magistrate judge determined the expert qualification question to be non-dispositive and, thus, within the magistrate judge's authority under 28 U.S.C. § 636(b)(1)(A) to decide without report and recommendation. Then, from the bench, the magistrate judge denied defendant's request for a ruling that plaintiff's expert is not qualified. The magistrate judge based his ruling on two grounds.

First, the magistrate judge concluded that the qualification of an expert witness is an evidentiary or procedural matter, not a substantive matter, so federal law applies. Thus, according to the magistrate judge, Rule 702 of the Federal Rules of Evidence, rather than § 8.01-581.20

of the Virginia Code, controls the qualification of an expert witness. And, under Rule 702, Dr. Marsden is qualified.

Second, the magistrate judge ruled that, even if federal law does not apply, Dr. Marsden is qualified under Virginia law. Specifically, the magistrate judge found that Dr. Marsden satisfies the "clinical practice" requirement of Virginia Code § 8.01-581.20. Alternatively, the magistrate judge relied on *Hunter v. Burroughs*, 96 S.E. 360 (Va. 1918), which ostensibly established two standards of care: a mechanical standard of care and a general professional standard of care. The magistrate judge decided that because the defendant in this case was operating x-ray equipment, the mechanical standard of care applies. And, because Dr. Marsden has expertise in the mechanical operation of such equipment, he is qualified to testify as to the mechanical standard of care.

With respect to the availability of *res ipsa loquitur*, the magistrate judge filed a report and recommendation on July 15, 1992, in which he recommended that plaintiff's motion for summary judgment be denied. However, the magistrate judge did not foreclose plaintiff's use of the doctrine at trial; rather, the applicability of *res ipsa loquitur* would be determined when all the evidence has been heard.

On July 20, 1992, the defendant filed an objection to the magistrate judge's order with respect to the qualification of plaintiff's expert and a request for reconsideration. In addition, the defendant objected to the magistrate judge's report and recommendation on the issue of *res*

ipsa loquitur. By order entered July 24, 1992, the magistrate judge denied defendant's request for reconsideration. On July 30, 1992, the defendant renewed his objections. This court held a hearing on the objections on September 1, 1992, and the matter is now ripe for disposition.

II.

Pursuant to 28 U.S.C. § 636(b)(1)(A), the district judge may reverse the magistrate judge's order with respect to plaintiff's expert if the factual findings are clearly erroneous or legal conclusions are contrary to law. Additionally, pursuant to 28 U.S.C. § 636(b)(1)(C), the district judge will undertake a *de novo* review of the magistrate judge's report and recommendation.

The expert witness qualification issue and the *res ipsa loquitur* issue were raised by the parties' motions for summary judgment. To carry a motion for summary judgment, the movant must show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The applicable standard of care and a deviation from that standard are two essential elements of a medical malpractice claim. *Raines v. Lutz*, 341 S.E.2d 194, 197 (Va. 1986). If the court finds that the magistrate judge's order is clearly erroneous or contrary to law, or, in other words, that plaintiff's expert is not qualified to testify to the applicable standard of care, then the defendant will be entitled to summary judgment because, without the testimony of plaintiff's expert, the plaintiff will be unable to establish those essential elements of her case.

III.

At the hearing on defendant's objections, the plaintiff adopted the position that the defendant, as attending physician, was responsible for the proper functioning of the x-ray equipment, for the proper performance of the assisting physicians, and, in general, for anything that went wrong during plaintiff's arteriogram. In essence, the plaintiff relied on the "captain of the ship" theory,[2] although plaintiff's counsel declined to accept the court's suggestion of that terminology. For the reasons that follow, this court will not permit the plaintiff in this case to proceed on such a theory.

---

[2] A theory that would hold the attending physician liable, irrespective of any personal negligence, solely because he is the attending physician – i.e., the captain of the ship. Although this is a form of vicarious liability it does not carry with it the traditional requirements of a master-servant relationship. *McConnell v. Williams*, 65 A.2d 243, 245-48 (Pa. 1949).

First, the "captain of the ship" theory has not been recognized in Virginia. Indeed only one medical malpractice case under Virginia law even mentions "captain of the ship." In *Easterling v. Walton,* 156 S.E.2d 787 (Va. 1967), the plaintiff claimed negligence on the part of the defendant surgeon in failing to remove a "lap pad" from plaintiff's abdomen during surgery and in failing to render proper post-operative care. A nurse testified "that the surgeon is the 'captain of the ship' and has complete control over the operation and direction of all persons assisting him in the operating room." *Id.* at 789. However, the plaintiff offered no expert testimony to establish defendant's negligence in failing to remove the lap pad. The trial court struck plaintiff's evidence on the issue of defendant's negligence in failing to remove the lap pad, the jury returned a verdict in favor of the defendant, and the trial court entered judgment upon the verdict.

On plaintiff's appeal, the Virginia Supreme Court of Appeals reversed the trial court's judgment on the ground that the trial court erred in refusing to apply the doctrine of *res ipsa loquitur.* The unrefuted evidence was that the defendant surgeon was in complete charge of the operation as "captain of the ship." *Id.* at 791. The court decided that this evidence, in combination with other evidence in the case, warranted application of the doctrine of *res ipsa loquitur.* Nevertheless, the court did not discuss or apply the "captain of the ship" as a legal theory; rather, the court used the phrase "captain of the ship" as a shorthand expression to explain that the evidence showed the surgeon was in total control throughout the operation. Neither *Easterling* nor any other

Virginia case has recognized a "captain of the ship" theory to impose liability on a physician who was not personally culpable.

Second, even in jurisdictions where the "captain of the ship" doctrine has been recognized, it has been applied almost exclusively in the operating room context. The doctrine has not been applied to hold a radiologist liable as the "captain of the ship."

Third, the Virginia Medical Malpractice Act, Virginia Code §§ 8.01-581.1-.20, is a comprehensive system constructed by the Virginia General Assembly to process medical malpractice claims. Under the Act, claims may be brought against any "health care provider," which is defined to include, *inter alia*, "a physician or hospital, dentist, pharmacist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, [and] health maintenance organization." Va. Code § 8.01-581.1. The Act contains no provision for vicarious liability, and the breadth of the statutory scheme suggests that none is intended. For example, because a physician, a nurse, or a hospital each may be held liable in their own right, there is no basis or reason for holding a physician liable for the conduct of another physician, a hospital nurse, or any other hospital employee.[3]

---

[3] Of course, traditional vicarious liability principles still apply so that, for example, a hospital might be held liable for the negligence of its employees under a master-servant theory. However, because the plaintiff here has not alleged facts in support of a master-servant relationship between the defendant and other persons who may have been present during plaintiff's

IV.

The issue of *res ipsa loquitur*, raised by plaintiff's motion for summary judgment, can be disposed of in summary fashion. As the magistrate judge pointed out in his report and recommendation, *res ipsa loquitur* is merely a rule of evidence; "*res ipsa loquitur* means that the facts of the occurrence . . . make a case to be decided by the jury, not that they forestall the verdict." *Danville Community Hospital, Inc. v. Thompson*, 43 S.E.2d 882, 887-88 (Va. 1947) (quoting *Hines v. Beard*, 107 S.E. 717, 719 (Va. 1921); *Sweeney v. Erving*, 228 U.S. 233, 240 (1913)). Thus, even if the doctrine applies in a medical malpractice case like this one and even if the plaintiff satisfies the requisite elements of the doctrine, *res ipsa loquitur* does not entitle the plaintiff to summary judgment. Accordingly, the court accepts the magistrate judge's recommendation that plaintiff's motion for summary judgment be denied.

The plaintiff has also interposed the doctrine of *res ipsa loquitur* as a defense to defendant's motion for summary judgment. It is plaintiff's position that even if she is unable to prove by expert testimony that Dr. Tegtmeyer breached the standard of care, the posture of the evidence establishes that *res ipsa loquitur* is applicable and, therefore, the issue of negligence must be submitted to a jury. Plaintiff's reliance on *res ipsa loquitur* in this context must also fail.

The Virginia Supreme Court has stated time after time that for *res ipsa loquitur* to apply, the plaintiff must

---

arteriogram, and as no such facts appear from the record, the court does not consider that variety of vicarious liability.

identify the instrumentality causing the injury and show that it was under the exclusive control of the defendant. *Danville*, 43 S.E. 2d at 887; *Easterling*, 156 S.E.2d at 789-90. Although, for purposes of summary judgment, Peck may be able to prove that the x-ray equipment used in her arteriogram was the instrumentality of her injury, she is not able to prove that it was under the exclusive control of Dr. Tegtmeyer. On the contrary, the uncontradicted evidence is that the equipment was owned and maintained by the University of Virginia Hospital, that a substantial portion of the arteriogram procedure was performed by the four physicians who have been dismissed and that Dr. Tegtmeyer was not present in the room for very substantial periods of time while the procedure was being performed.

Danville Community Hospital, Inc. v. Thompson, supra, upon which Peck so heavily relies, is clearly distinguishable. In *Danville*, a newborn infant was burned while in the hospital's nursery. The suit was brought against the *hospital*. The evidence was that at all times hospital employees were in exclusive charge of the well-being of the infant. In the case at bar it is not the hospital but only Dr. Tegtmeyer – one among several persons or entities who could have been negligent – whom Peck seeks to hold responsible for her burn. Thus, Peck's reliance on *res ipsa loquitur* must fail because the evidence shows that Dr. Tegtmeyer was not in exclusive control of the equipment nor of the procedure which was being performed.

V.

A.

The court now turns to whether plaintiff's expert may be permitted to testify as to the applicable standard of care. In resolving this issue, the court must decide whether Virginia law or federal law governs the qualification of a standard of care expert or, in terms of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), whether the state law is substantive or procedural.

The relevant state law is found at Virginia Code § 8.01-581.20. That statute defines the standard of care and establishes requirements for the qualification of a standard of care expert:

> [T]he standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted. . . . Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. . . . A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those

> standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

Va. Code § 8.01-581.20(A).

It is beyond dispute that the standard of care itself is substantive. "*What* is such a standard of care, *whether* it has been violated, and *whether* such violation is the proximate cause of plaintiff's injury – in short, the substantive elements of a medical malpractice suit – are all questions to be determined by state law in a diversity action." *Fitzgerald v. Manning*, 679 F.2d 341, 346 (4th Cir. 1982). In addition, it is settled that expert testimony is required to establish the pertinent standard of care as well as a violation of that standard. *Id.* at 347.

While no court has decided expressly whether the expert qualification requirements of Virginia Code § 8.01-581.20 are substantive, at least two federal courts have in fact applied Virginia law. For instance, in *Fitzgerald*, which arose before the enactment of the Virginia Medical Malpractice Act, the Fourth Circuit applied state common law qualification requirements, precursors of the present statutory requirements: "In order to qualify as an expert competent to provide such testimony [on the standard of care], the witness must show familiarity with the 'degree of skill and care' employed by the ordinary, prudent practitioner in the relevant field and community." *Id.* at 347. Similarly, in *Chapman v. Edgerton*, 529 F.Supp. 519 (W.D.Va. 1982), which also arose prior to the creation of the Act, this court recognized the Virginia

common law standard of care as "that of other like specialists in good standing, in the same or similar localities as the defendant." *Id.* at 520. The court then concluded that "[i]t is this standard, and the court's explanations of that standard, that will govern the competency of expert witnesses at trial." *Id.* Thus, by their unhesitating application of state law, both *Fitzgerald and Chapman* suggest that the qualification of a standard of care expert is governed by state law in a diversity action.[4]

The substantive-procedural question has been explicitly addressed in the context of other "procedural" requirements of the Virginia Medical Malpractice Act. In *DiAntonio v. Northampton-Accomack Memorial Hospital,* 628 F.2d 287 (4th Cir. 1980), the Fourth Circuit held that the requirement of prior notice of intention to file a medical malpractice action[5] and the provision for panel review[6] were "so 'intimately bound up' with the rights and obligations being asserted as to require their application in federal courts" under the *Erie* doctrine. *Id.* at 290. In addition, the court held that the provision for admission into evidence of the panel opinion[7] also applies in federal court. *Id.* at 291. The court stated that:

> Though the provision for admission into evidence of the panel opinion be regarded as the resolution of an evidentiary problem, it does not

---

[4] Compare *Lee v. Adrales,* 778 F.Supp. 904 (W.D.Va. 1991), in which this court determined the Virginia qualification requirements under the Federal Rules of Evidence.

[5] Va. Code § 801-581.2.

[6] Va. Code §§ 8.01-581.2 and 8.01-581.3.

[7] Va. Code § 8.01-581.8.

> follow that it is the kind of procedural rule which need not be followed in a federal court. It has been recognized that "there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's substantive policy."

Id. (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2405 at 326-27 (1971)). The court decided that application of the state provision in federal court would further the state's substantive policy of encouraging and promoting pretrial mediation. Additionally, the court found no countervailing federal policy. In effect, the Fourth Circuit held that certain "procedural" requirements of the Virginia Medical Malpractice Act were substantive and, thus, applicable in federal court.

On this reasoning, the qualification requirements of Virginia Code § 8.01-581.20, like the provisions of the Act at issue in *DiAntonio,* obtain in federal court. While the qualification requirements may be viewed as "procedural" rules, they are "intimately bound up" with a state substantive rule, the standard of care itself. The structure of the statute indicates that the standard of care and the qualification requirements for a standard of care expert are intertwined. First, the standard of care is "that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." Va. Code § 8.01-581.20(A). Second, as noted above, the standard of care must be established by expert testimony. Third, the same paragraph that defines the standard of care prescribes requirements for

the qualification of an expert on the standard of care. In other words, under the statutory scheme, the standard of care is that which is testified to by an expert qualified under the statute.

Moreover, the qualification requirements further state policy. As observed in *DiAntonio*, the original purpose of the Act was to lower the cost of medical malpractice insurance by reducing the amount of medical malpractice litigation. 628 F.2d at 290. Like pretrial mediation, the expert qualification requirements pose an obstacle to meritless claims. The qualification requirements help insure that a defendant "health care provider" is held to a fair and accurate standard of care and only found liable if the applicable standard of care and a violation thereof are established.

Furthermore, no countervailing federal interests militate against applying the qualification requirements in federal court.

For these reasons, the qualification requirements for a standard of care expert, as set forth in Virginia Code § 8.01-581.20, are applicable in a diversity case.

B.

At least one jurisdiction has avoided the necessity of deciding whether state law or Fed. R. Evid. 702 governs the qualifications of experts by treating the problem as one of competency of witness under Fed.R.Evid. 601. Rule 601 requires the application of state law in determining competency in diversity cases, when state law supplies the rule of decision. Therefore, reasoned Tennessee

federal district courts, to determine the competency of an expert witness in a medical malpractice case, Rule 601 requires that the witness meet the qualifications set forth in the state statute. *Ralph v. Nagy,* 749 F. Supp. 169, 172-73 (M.D. Tenn. 1990); *Crumley v. Memorial Hospital,* 509 F.Supp. 531, 532 n.2 (E.D. Tenn. 1978), *aff'd* 647 F.2d 164 (6th Cir. 1981). However, when squarely faced with the tension that exists between Rule 601 and Rule 702, the Sixth Circuit declined to resolve it. *Ward v. U.S.,* 838 F.2d 182, 188 (6th Cir. 1988)

Given the historical context of Rule 601, it is doubtful that the rule was intended to supplant Rule 702. It appears that Rule 601 has been primarily concerned with the proper application of the various states' dead man statutes. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 601[2] (1992) and 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6006 (1992). More importantly, it appears that the issue of a witness's [sic] standing to testify as an expert is treated as an issue of qualifications rather than an issue of competency by the Fourth Circuit. *Scott v. Sears Roebuck & Co.,* 789 F.2d 1052 (4th Cir. 1986) (Admissibility of testimony of human factors expert in diversity case governed by Rule 702, rather than state law). Although the concept of using Rule 601 is a novel approach to a troublesome problem, the view expressed in *DiAntonio* better comports with *Erie* and the Federal Rules of Evidence.

VI.

Having decided that the qualification requirements of Virginia Code § 8.01-581.20 apply in this case, the court

must decide whether plaintiff's expert meets the statutory requirements.

As discussed above, Virginia Code § 8.01-581.20 sets out requirements for the qualification of a standard of care expert. "Any physician who is licensed to practice" in Virginia, or in another state with equivalent requirements for licensure, is presumptively qualified to testify on the standard of care in his specialty or field of medicine. Because Dr. Marsden is neither a physician nor licensed to practice, he must meet the general qualification requirements of the statute. As amended in 1992, the statute provides in pertinent part:

> A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

Va. Code § 8.01-581.20(A).

> Accordingly, in order to qualify as an expert on the standard of care, plaintiff's expert must:
>
> (1) have expert knowledge of the standards of radiology,
>
> (2) know what conduct conforms to those standards, and
>
> (3) have had active clinical practice within one year of the date at issue,
>
> (4) in either radiology or a related field of medicine.

As explained below, Dr. Marsden fails on all four grounds.

Dr. Marsden holds an M.S in Radiation Physics from Columbia University and Ph.D. in Physiology from Jefferson Medical College in Philadelphia. He is certified by the American board of Radiology (ABR) in Radiological Physics, which includes the physics of Diagnostic Radiology, Nuclear Medicine, and Radiation Therapy. Dr. Marsden has been elected by the ABR to be a Physics Advisor to the ABR, a position he currently holds. He has served as an oral board examiner in physics for the ABR, and he has drafted the written questions for the physics portion of the board examination in Nuclear Medicine. Since 1968, he has been affiliated with the radiology department at St. Luke's Roosevelt Hospital in New York. He is presently Director of the Radiation Physics Department and the Nuclear Medicine Laboratory at the hospital. In addition, he is an assistant professor of radiology at Columbia University, where he teaches a course in radiation physics to radiology residents. In short, he is eminently qualified in the field of radiation physics.

Notwithstanding the above-recited qualifications, the evidence reveals that Dr. Marsden does not have expert knowledge of the standard of care in radiology or of what conduct conforms or fails to conform to that standard. Significantly, Dr. Marsden is not a radiologist; in fact, he is not an M.D. of any kind. And, although he has consulted extensively on patient cases, he has not treated patients; indeed Dr. Marsden admitted that a radiation physicist "does not get involved with the patient." (Marsden Deposition at 42.) When asked during his deposition to state how long it would take to pass the catheter used

to inject the dye for an arteriogram, Dr. Marsden testified: "A radiologist would be better to answer that, someone who does it. . . . I would be guessing." (Marsden Deposition at 24.) And, while he stated that he was surprised that the procedure in this case lasted eight hours, he based his surprise not on his own knowledge and experience but on the opinions of two radiologists. (Marsden Deposition at 26.)

Even if Dr. Marsden meets the first two statutory requirements for qualification, still he must meet the "clinical practice" requirement. Neither the statute nor any cases define "clinical practice." Dictionary definitions are of some assistance. "Clinical" has been defined as "involving or depending on direct observation of the living patient." *Webster's Third New International Dictionary* 423 (1961). Elsewhere "clinical medicine" has been defined as "[t]he study of disease and evaluation of the medical situation at the bedside of a patient." 1 J.E. Schmidt, *Attorneys' Dictionary of Medicine* C-247 (1992). Essential to a "clinical practice," then, is the treatment of patients.

Under a common sense reading of the plain language of the statute, Dr. Marsden has never had a "clinical practice" in radiology. He has admitted that, as a radiation physicist, he "does not get involved with the patient." (Marsden Deposition at 42.) Moreover, radiation physics is not a "related field of medicine" to radiology. Indeed radiation physics is not a field of medicine at all. A career in radiation physics, like that of Dr. Marsden, requires no medical training. Even if radiation physics could be considered a "related field of medicine," Dr. Marsden has never had what could be called a "clinical

practice" in radiation physics. Because Dr. Marsden has never had a "clinical practice" of any kind, he does not meet the statutory requirements for qualification as an expert on the standard of care.

Therefore, Dr. Marsden does not qualify as an expert witness under Va. Code § 8.01-581.20 and cannot testify as to the standard of care for a radiologist. Inasmuch as the plaintiff has designated no other standard of care expert, the plaintiff cannot establish two essential elements of a medical malpractice claim: the standard of care and a violation of that standard.

VII.

This court finds that the magistrate judge's reliance on *Hunter v. Burroughs* 96 S.E. 360 (Va. 1918), is misplaced. The statutory definition of standard of care and the statutory requirements for qualification of an expert on the standard of care were enacted long after *Hunter*, and while *Hunter* does refer to two standards of care, the statute makes no distinction between a mechanical standard of care and a general professional standard of care. Clearly there is only one standard of care: "that degree of skill and diligence practiced by a reasonably prudent practitioner in the filed of practice or specialty in this Commonwealth." Va. Code §8.01-581.20(A).

That single standard obtains regardless of whether or not the alleged negligence involved the use of equipment. *See Gonzalez v. Fairfax Hospital System*, 389 S.E.2d 458 (Va. 1990). In *Gonzalez*, the Virginia Supreme Court found that a patient who cut his foot on a screw in a hospital

whirlpool tub was required to pursue his action under the Act. There, the court said:

> The alleged negligent acts occurred while [the plaintiff] was receiving treatment as a patient in the hospital. Therefore, [s]he was receiving "health care" as defined by the Act. Additionally, the alleged tort was "based on health care or professional services rendered . . . to a patient," which constitutes "malpractice." Finally, [the plaintiff] concedes that the health care [s]he received was rendered by [a] "health care provider[]," i.e., . . . a physician.

389 S.E.2d at 459 (citations omitted). Under the plain meaning of the Act, plaintiff's claim lies squarely within the Act.

VIII.

The plaintiff is unable to establish the appropriate standard of care and a breach thereof for want of an expert witness. Nor can the plaintiff proceed on an alternative theory which falls outside of the Medical Malpractice Act. Consequently, summary judgment must be entered for defendant.

An appropriate order will be entered.

/s/ Jackson L. Kizer
United States District Judge

Rule 702. Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; expert testimony; determination of standard in action for damages. A. In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or speciality in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the education and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does

not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's speciality or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury. (1979, c. 325; 1980, c. 165; cc. 146, 729; 1992, c. 240.)